

REMARKS

The Office Action dated October 30, 2007, has been received and carefully considered. In this response, claim 1 has been amended, claim 21 has been cancelled without prejudice. No new matter has been added. Entry of the amendments to claim 1, and the cancellation of claim 1 without prejudice is respectfully requested. Reconsideration of the outstanding rejections in the present application is also respectfully requested based on the following remarks.

I. THE NON-STATUTORY SUBJECT MATTER REJECTION OF CLAIM 21 & 22

On page 2 of the Office Action, claims 21 and 22 were rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. This rejection is hereby respectfully traversed.

Regarding claim 21, the Examiner asserts that claim 21 recites a "signal embodied in at least one carrier wave" and thus renders claim 21 to be non-statutory. Applicant respectfully disagrees, however, in order to further the prosecution of the present patent application, claim 21 has been cancelled without prejudice. Thus, Applicant respectfully submits that the cancellation of claim 21 renders the non-statutory rejection moot.

Regarding claim 22, the Examiner asserts that claim 22 recites a "signal embodied in at least one carrier wave" and thus renders claim 21 to be non-statutory. Applicant respectfully disagrees. Applicant respectfully submits that nowhere does claim 22 recite a "signal embodied in at least one carrier wave," as asserted by the Examiner. Rather, claim 22, as presently claimed, recites "at least one processor readable medium for storing a computer program of instructions." Thus, Applicant respectfully submits that claim 22 recites a functional descriptive material (e.g., a computer program of instructions) stored on some computer-readable medium (e.g., a processor readable medium) and thus renders claim 22 statutory.

In view of the foregoing, it is respectfully requested that the aforementioned non-statutory subject matter rejection of claims 21 and 22 be withdrawn.

II. THE ANTICIPATION REJECTION OF CLAIMS 1-5, 7-11, 14-20, & 23

On page 2 of the Office Action, claims 1-5, 7-11, 14-20, and 23 were rejected under 35 U.S.C. § 102(b) as being anticipated by Kelly (An ECN Probe-Based Connection Acceptance Control). This rejection is hereby respectfully traversed.

Under 35 U.S.C. § 102, the Patent Office bears the burden of presenting at least a prima facie case of anticipation. In re

Sun, 31 USPQ2d 1451, 1453 (Fed. Cir. 1993) (unpublished). Anticipation requires that a prior art reference disclose, either expressly or under the principles of inherency, each and every element of the claimed invention. Id.. "In addition, the prior art reference must be enabling." Akzo N.V. v. U.S. International Trade Commission, 808 F.2d 1471, 1479, 1 USPQ2d 1241, 1245 (Fed. Cir. 1986), cert. denied, 482 U.S. 909 (1987). That is, the prior art reference must sufficiently describe the claimed invention so as to have placed the public in possession of it. In re Donohue, 766 F.2d 531, 533, 226 USPQ 619, 621 (Fed. Cir. 1985). Such possession is effected only if one of ordinary skill in the art could have combined the disclosure in the prior art reference with his/her own knowledge to make the claimed invention. Id..

First and foremost, the Examiner asserts that the Kelly paper is a 102(b) reference. However, Applicant respectfully submits that there is no indication (e.g., date) that demonstrates the Kelly paper is a 102(b) reference. Although Applicant submitted the Kelly paper in the Information Disclosure Statement dated September 21, 2005, Applicant did not make any indication that the Kelly paper is a 102(b) reference. Applicant respectfully submits that the Examiner has the burden to establish that the Kelly paper is a 102(b) reference, and the

Examiner has failed to establish that the Kelly paper is a 102(b) reference. Therefore, at least for the reasons stated above, Applicant respectfully requests that the Examiner withdraw the anticipation rejection of claims 1-5, 7-11, 14-20, and 23.

Assuming Kelly is a proper 102(b) reference, Applicant respectfully submits that Kelly fails to disclose, or even suggest, every claimed recitation of the present patent application, which is discussed further in more detail below.

Regarding claim 1, the Examiner asserts that Kelly discloses the claimed invention. Applicant respectfully disagrees. In particular, Applicant respectfully submits that Kelly fails to disclose, or even suggest, a method for end-to-end admission control of real-time packet flows in a network comprising: "determining, at at least one intermediate network element on the network path, at least one flow rate associated with a plurality of packets" as presently claimed. In contrast, Kelly discloses "sending a series of probe packets from A to B in an attempt to infer the level of congestion." See, Section 4, paragraph 2, lines 2-4. Accordingly, Kelly appears to be concerned only with sending packets from A and B and not determining at least one flow rate at at least one intermediate network element on the network path. The Examiner relies on the

routers within the network as a disclosure of intermediate network elements on the network path. Applicant respectfully submits that Kelly merely discloses that the "probe-based connection acceptance control distributes the admission decision between the routers within the network." See, Section 1, column 2, last paragraph, lines 1-3. Kelly fails to disclose that the routers within the network are "on the network path" of the first network element and the second network element, as presently recited. Moreover, Kelly merely discloses that there are routers within the network, however, nowhere does Kelly disclose, or even suggest, "determining, at at least one intermediate network element on the network path, at least one flow rate associated with a plurality of packets," as claimed.

Also, Applicant respectfully submits that Kelly fails to disclose, or even suggest, "marking at least one predetermined bit in the at least one probe packet if the at least one flow rate is greater than a predetermined rate," as claimed. In contrast, Kelly merely discloses "probe packets are UDP packets with the ECN capable bit set in the IP header, a sequence number, and contain a timestamp for calculating the RTT (round trip time)." See, Section 4, paragraph 2, lines 6-8. Accordingly, the series of probe packets sent from A to B all contain the ECN capable bit set in the IP header and therefore

the ECN capable bit is not marked "if the at least one flow rate is greater than a predetermined rate," as claimed. Therefore, Kelly fails to disclose, or even suggest, the step of determining whether "the at least one flow rate is greater than a predetermined rate," as claimed.

At this point, Applicants would like to emphasize to the Examiner that, as stated in MPEP § 2131, "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

In view of the foregoing, is it respectfully submitted that claim 1 is allowable over Kelly.

Regarding claims 2-5, 7-11, 14-20, and 23 these claims are dependent upon independent claim 1. Thus, since independent claim 1 should be allowable as discussed above, claims 2-5, 7-11, 14-20, and 23 should also be allowable at least by virtue of their dependency on independent claim 1. Moreover, these claims recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination. For example, claim 3 recites "marking at least one second predetermined bit in the at least one second probe packet if the at least one flow rate is greater than a second

predetermined rate." Applicant respectfully submits Kelly fails to disclose, or even suggest, "a second predetermined rate." Instead, Kelly merely discloses a threshold level, ϵ . Moreover, Kelly fails to disclose, or even suggest, performing the step of determining whether "the at least one flow rate is greater than a second predetermined rate," as presently recited.

In view of the foregoing, it is respectfully requested that the aforementioned anticipation rejection of claims 1-5, 7-11, 14-20, and 23 be withdrawn.

III. THE OBVIOUSNESS REJECTION OF CLAIMS 6, 12, 13, 21, & 22

On page 5 of the Office Action, claims 6, 12, 13, 21, and 22 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kelly (An ECN Probe-Based Connection Acceptance Control) in view of Li (U.S. Patent Application Publication No. 2004/0192312). This rejection is hereby respectfully traversed.

Under 35 U.S.C. § 103, the Patent Office bears the burden of establishing a prima facie case of obviousness. In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). The Patent Office can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of references. Id.

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). That is, under 35 U.S.C. § 103, teachings of references can be combined only if there is some suggestion or motivation to do so. Id. However, the motivation cannot come from the applicant's invention itself. In re Oetiker, 977 F.2d 1443, 1447, 24 USPQ2d 1443, 1446 (Fed. Cir. 1992). Rather, there must be some reason, suggestion, or motivation found in the prior art whereby a person of ordinary skill in the art would make the combination. Id.

It is respectfully submitted that the aforementioned obviousness rejection of claims 6, 12, 13, 21, and 22 has become moot in view of the deficiencies of the primary reference (i.e., Kelly) as discussed above with respect to independent claim 1. That is, claims 6, 12, 13, 21, and 22 are dependent upon independent claim 1 and thus inherently incorporate all of the limitations of independent claim 1. Also, the secondary reference (i.e., Li) fails to disclose, or even suggest, the deficiencies of the primary reference as discussed above with respect to independent claim 1. Indeed, the Examiner does not even assert such. Thus, the combination of the secondary

reference with the primary reference also fails to disclose, or even suggest, the deficiencies of the primary reference as discussed above with respect to independent claim 1. Accordingly, claims 6, 12, 13, 21, and 22 should be allowable over the combination of the secondary reference with the primary references at least by virtue of their dependency on independent claim 1. Moreover, claims 6, 12, 13, 21, and 22 recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination.

In view of the foregoing, it is respectfully requested that the aforementioned obviousness rejection of claims 6, 12, 13, 21, and 22 be withdrawn.

IV. CONCLUSION

In view of the foregoing, it is respectfully submitted that the present application is in condition for allowance, and an early indication of the same is courteously solicited. The Examiner is respectfully requested to contact the undersigned by telephone at the below listed telephone number, in order to expedite resolution of any issues and to expedite passage of the present application to issue, if any comments, questions, or suggestions arise in connection with the present application.

To the extent necessary, a petition for an extension of time under 37 CFR § 1.136 is hereby made.

Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-0206, and please credit any excess fees to the same deposit account.

Respectfully submitted,

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